

STATE OF TENNESSEE
DEPARTMENT OF ENVIRONMENT AND CONSERVATION

IN THE MATTER OF:)	
RANDALL STUTTS)	
and)	
JOE TOWNSEND d/b/a TOWNSEND)	DIVISION OF WATER
CONSTRUCTION)	POLLUTION CONTROL
)	
RESPONDENTS)	CASE NUMBER WPC07-0239

COMMISSIONER'S ORDER AND ASSESSMENT

NOW COMES James H. Fyke, Commissioner of the Tennessee Department of Environment and Conservation, and states:

PARTIES

I.

James H. Fyke is the duly appointed Commissioner of the Tennessee Department of Environment and Conservation (hereinafter the "Commissioner" and the "Department," respectively).

II.

Randall Stutts (hereinafter "Respondent Stutts") is a resident of the state of Tennessee and is the owner of property located at 1850 Highway 70E in Cheatham County (hereinafter the "site"). Service of process may be made on Respondent Stutts at 1850 Highway 70E, Kingston Springs, Tennessee 37082.

III.

Joe Townsend d/b/a Townsend Construction (hereinafter "Respondent Townsend") is a resident of the state of Tennessee and was contracted by Respondent Stutts to conduct

construction activities at the site. Service of process may be made on Respondent Townsend at 1134 Sneed Road, Kingston Springs, Tennessee 37082.

JURISDICTION

IV.

Whenever the Commissioner has reason to believe that a violation of Tennessee Code Annotated (hereinafter "T.C.A.") § 69-3-101 *et seq.*, the Water Quality Control Act (hereinafter "the Act"), has occurred, or is about to occur, the Commissioner may issue a complaint to the violator and the Commissioner may order corrective action be taken pursuant to T.C.A. § 69-3-109(a) of the Act. Further, the Commissioner has authority to assess civil penalties against any violator of the Act, pursuant to T.C.A. § 69-3-115 of the Act; and has authority to assess damages incurred by the state resulting from the violation, pursuant to T.C.A. § 69-3-116 of the Act. Department Rules governing general water quality criteria and use classifications for surface waters have been promulgated pursuant to T.C.A. § 69-3-105 and are effective as the *Official Compilation Rules and Regulations of the State of Tennessee* (hereinafter "Rule"), Chapters 1200-4-3 and 1200-4-4. Pursuant to T.C.A. § 69-3-107(13), the Commissioner may delegate to the director any of the powers, duties, and responsibilities of the Commissioner under the Act.

V.

The Respondents are "persons" as defined by T.C.A. § 69-3-103(20) and as herein described, have violated the Act.

VI.

T.C.A. § 69-3-108 requires a person to obtain coverage under a permit from the department prior to discharging any substances to waters of the state, or to a location from which it is likely that the discharged substance will move into waters of the state. Coverage under the general permit for Storm Water Discharges Associated with Construction Activity

(hereinafter "TNCGP") may be obtained by submittal of a Notice of Intent (NOI), a site specific Storm Water Pollution Prevention Plan (hereinafter "SWPPP") and appropriate fee.

VII.

Rule 1200-4-7-.04 requires a person to submit an application prior to engaging in any activity that requires an Aquatic Resource Alteration Permit (hereinafter "ARAP") that is not governed by a general permit or a § 401 Water Quality Certification. No activity may be authorized unless any lost resource value associated with the proposed impact is offset by mitigation sufficient to result in no overall net loss of resource value.

VIII.

The unnamed tributary to the Harpeth River, described herein, is "waters of the state" as defined by T.C.A. § 69-3-103(33). Pursuant to T.C.A. § 69-3-105(a)(1), all waters of the state have been classified by the Tennessee Water Quality Control Board for suitable uses. Department Rule 1200-4-4, *Use Classifications for Surface Waters*, is contained in the *Rules of Tennessee Department of Environment and Conservation Division of Water Pollution Control Amendments*. Accordingly, these waters of the state are classified for the following uses: fish and aquatic life, recreation, irrigation, livestock watering and wildlife.

FACTS

IX.

On July 3, 2007, personnel from the Tennessee Wildlife Resources Agency (hereinafter, "TWRA") investigated a complaint regarding the construction of a dam and impoundment on an unnamed tributary to the Harpeth River. The TWRA conducted an aerial survey of the site and noted that construction of the dam appeared to be substantially complete and the resulting impoundment was filling with water. On July 27, 2007, TWRA personnel forwarded the

complaint and the information collected thus far to the Division of Water Pollutions Control (hereinafter "the Division") personnel in the Nashville Environmental Field Office (hereinafter "the NEFO"). TWRA's information included a statement from Respondent Stutts that Respondent Townsend had been contracted to conduct the activities noted on July 3, 2007.

X.

On August 13, 2007, Division personnel from the NEFO met Respondent Stutts's wife at the site and spoke with Respondent Stutts by telephone, explaining the complaint and requesting access to the site. Division personnel noted that excavation and fill activities in the tributary upstream and downstream of the dam and construction of the dam itself were substantially complete. These construction activities had disturbed an area greater than one acre. No Erosion Prevention and Sediment Control (hereinafter "EPSC") measures had been installed, and the impoundment was filling with water.

Upstream of the dam, Division personnel observed that approximately 1200 linear feet of stream had been impounded and estimated that an additional 600 linear feet would be inundated when the impoundment completed filling. Division personnel conducted a hydrologic determination of the unnamed tributary upstream of the impoundment and noted sustained flow, a well-defined and hydrologically diverse channel with riffle-run-pool sequences clearly evident, and numerous groundwater connections. Aquatic life such as gill-breathing snails, caddisfly larvae and fish were present throughout this segment of the unnamed tributary.

Beginning at the base of the dam, Division personnel observed that the unnamed tributary was dry for approximately 1200 feet before its confluence with another tributary to the Harpeth River. Division personnel also saw numerous deposits of the shells of gill breathing snails and caddisfly larvae cases within this dry segment, indicating previous periods of sustained flow. Based on these indicators, the unnamed tributary was determined to be a stream and therefore

waters of the state. Based on the lack flow and the lack of living aquatic organisms for approximately 1200 feet, it was determined that the tributary downstream of the dam and impoundment was no longer capable of supporting the variety and types of aquatic life observed in the upstream segment not affected by the impoundment. Upon completion of a file review, Division personnel determined that coverage under the TNCGP and authorization under an ARAP for these activities had not been requested or issued.

XI.

On August 17, 2007, the Division issued a Notice of Violation (hereinafter "NOV") to Respondent Stutts for the violations observed during the August 13, 2007, site investigation. In the NOV, the Division instructed Respondent Stutts to submit a Corrective Action Plan (CAP), within thirty days of receipt of the NOV, detailing the methods to be implemented to remove the impoundment and restore the stream to its original condition. Respondent Stutts acknowledged receipt of this NOV on August 23, 2007.

XII.

On September 14, 2007, and again on October 12, 2007, representatives of Respondent Stutts contacted the Division to request additional time to submit the CAP required by the NOV of August 17, 2007. Division personnel agreed to extend the CAP submittal date to November 3, 2007.

XIII.

On October 16, 2007, the Division issued a NOV to Respondent Townsend for the violations noted during the August 13, 2007 site investigation.

XIV.

To date, Respondent Townsend has not responded to the October 16, 2007 NOV.

VIOLATIONS

XV.

By conducting land disturbance activities without coverage under the TNCGP and by altering waters of the state without authorization under an ARAP, the Respondents have violated T.C.A. §§ 69-3-108(a)-(b) and 69-3-114(b).

T. C. A. § 69-3-108(a) reads as follows:

Every person who is or is planning to carry on any of the activities outlined in subsection (b), other than a person who discharges into a publicly owned treatment works or who is a domestic discharger into a privately owned treatment works, or who is regulated under a general permit as described in subsection (j), shall file an application for a permit with the commissioner or, when necessary, for modification of such person's existing permit.

T.C.A. § 69-3-108(b) reads in relevant part as follows:

It is unlawful for any person, other than a person who discharges into a publicly owned treatment works or a person who is a domestic discharger into a privately owned treatment works, to carry out any of the following activities, except in accordance with the conditions of a valid permit:

- (1) The alteration of the physical, chemical, radiological, biological, or bacteriological properties of any Waters of the State;
- (4) The development of a natural resource or the construction, installation, or operation of any establishment or any extension or modification thereof or addition thereto, the operation of which will or is likely to cause an increase in the discharge of wastes into the waters of the state or would otherwise alter the physical, chemical, radiological, biological or bacteriological properties of

any waters of the state in any manner not already lawfully authorized;

(6) The discharge of sewage, industrial wastes or other wastes into waters, or a location from which it is likely that the discharged substance will move into waters;

T.C. A. § 69-3-114(b) reads as follows:

In addition, it is unlawful for any person to act in a manner or degree which is violative of any provision of this part or of any rule, regulation, or standard of water quality promulgated by the board or of any permits or orders issued pursuant to the provisions of this part; or fail or refuse to file an application for a permit as required in § 69-3-108; or to refuse to furnish, or to falsify any records, information, plans, specifications, or other data required by the board or the Commissioner under this part.

XVI.

By causing a condition of pollution in the unnamed tributary to the Harpeth River, the Respondents have violated T.C.A. Section 69-3-114(a).

T.C.A. § 69-3-114(a) states:

It shall be unlawful for any person to discharge any substance into the waters of the state or to place or cause any substance to be placed in any location where such substances, either by themselves or in combination with others, cause any of the damages as defined in §69-3-103(22), unless such discharge shall be due to an unavoidable accident or unless such action has been properly authorized. Any such action is declared to be a public nuisance.

ORDER AND ASSESSMENT

XVII.

WHEREFORE, pursuant to the authority vested by T.C.A. §§ 69-3-109, 69-3-115 and 69-3-116, I, James H. Fyke, hereby issue the following ORDER AND ASSESSMENT to the Respondents.

1. The Respondents shall, immediately, establish and maintain effective EPSC measures on-site such that sediment is not allowed to leave the site or enter waters of the state. These EPSC measures shall be maintained until such time as all land disturbance activities at the site are complete and erosion-preventive permanent cover is established. The Respondents shall, within 14 days of receipt of this ORDER, submit written documentation and photographic evidence indicating that appropriate EPSC measures are in place. The Respondents shall submit this written documentation and photographic evidence to the Water Pollution Control Manager in the NEFO at 711 R.S. Gass Boulevard, Nashville, Tennessee 37243, a copy of the to the Water Pollution Control Enforcement and Compliance (E&C) Section Manager, at 401 Church Street, 6th Floor L&C Annex, Nashville, Tennessee 37243-1534.
2. The Respondents shall, within 30 days of receipt of this Order, submit a NOI, SWPPP, and the appropriate application fee for all remaining construction activities at the site. These documents and the application fee should be submitted to the Water Pollution Control Manager in the NEFO as shown in Item 1, above.
3. The Respondents shall, within 60 days of receipt of this ORDER, submit to the Division a corrective action plan (hereinafter, "CAP") to de-water the impoundment, remove accumulated sediment from areas within the de-watered impoundment upstream of the dam, dismantle the dam, place the spoil in an area where it will not re-enter the stream, and restore the affected areas of the stream and affected riparian zone downstream and upstream of the dam and impoundment to conditions representative of those upstream of the segment not affected by the construction of the impoundment. The CAP shall include a biological and morphological assessment of the restored stream and its watershed, a

component for vegetation monitoring and, in the event of mortality, vegetation replacement and a component for stream monitoring for five years. The CAP shall be prepared by a licensed professional engineer, licensed landscape architect, or other competent professional. The CAP shall detail the proposed method to be used to de-water the impoundment in a manner that will not result in further violations of the Act. The CAP shall also include the method and means by which the accumulated sediment will be removed from within the de-watered impoundment prior to dismantling the dam. The Respondents shall submit the CAP to Water Pollution Control Manager in the NEFO for review and approval and a copy of the CAP to the E&C Section, at the respective addresses shown in item 1, above. The Respondents must correct any deficiencies the division finds upon review of the CAP and the corrected CAP shall be resubmitted to the division within 30 days of notification of the deficiencies.

4. The Respondents shall, within 30 days of receipt of written approval from the Division, initiate the approved corrective actions. The written approval of the CAP by the Division will constitute authorization for restoration of the affected areas of the stream and watershed upstream of the dam and impoundment and no additional ARAP coverage is required. The Respondents shall submit written notification to the division that work has begun at the time the Respondents initiate the CAP. The Respondents shall submit the written notification to Water Pollution Control Manager in the NEFO and a copy to the E&C Section, at the respective addresses shown in item 1, above.
5. The Respondents shall, within 365 days of initiating the approved CAP, but not later than April 30, 2009, complete the CAP and submit written notification of completion to the Division. The Respondents shall submit the written notification to Water Pollution

Control Manager in the NEFO and a copy to the E&C Section, at the respective addresses shown in item 1, above.

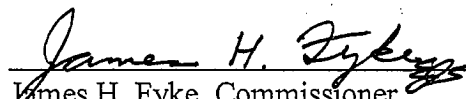
6. The Respondents shall pay a CIVIL PENALTY of ONE HUNDRED TWELVE THOUSAND FIVE HUNDRED DOLLARS (\$112,500.00) to the Division, to be paid as follows:

- a. The Respondents shall, within 30 days of entry of this ORDER, pay a CIVIL PENALTY in the amount of TWENTY FIVE THOUSAND DOLLARS (\$25,000.00).
- b. If the Respondents fail to comply with Part XVII, item 1 above in a timely manner, the Respondents shall pay a CIVIL PENALTY in the amount of SEVENTEEN THOUSAND FIVE HUNDRED DOLLARS (\$17,500.00), payable within 30 days of default. Further, in the event of default, the Respondent is assessed an additional penalty of ONE THOUSAND DOLLARS (\$1,000.00) for each and every day that the default continues. Said additional penalties are due and payable to the Department as they accrue.
- c. If the Respondents fail to comply with Part XVII, item 2 above in a timely manner, the Respondents shall pay a CIVIL PENALTY in the amount of SEVENTEEN THOUSAND FIVE HUNDRED DOLLARS (\$17,500.00), payable within 30 days of default. Further, in the event of default, the Respondent is assessed an additional penalty of ONE THOUSAND DOLLARS (\$1,000.00) for each and every day that the default continues. Said additional penalties are due and payable to the Department as they accrue.

- d. If the Respondents fail to comply with Part XVII, item 3 above in a timely manner, the Respondents shall pay a CIVIL PENALTY in the amount of SEVENTEEN THOUSAND FIVE HUNDRED DOLLARS (\$17,500.00), payable within 30 days of default. Further, in the event of default, the Respondent is assessed an additional penalty of ONE THOUSAND DOLLARS (\$1,000.00) for each and every day that the default continues. Said additional penalties are due and payable to the Department as they accrue.
- e. If the Respondents fail to comply with Part XVII, item 4 above in a timely manner, the Respondents shall pay a CIVIL PENALTY in the amount of SEVENTEEN THOUSAND FIVE HUNDRED DOLLARS (\$17,500.00), payable within 30 days of default. Further, in the event of default, the Respondent is assessed an additional penalty of ONE THOUSAND DOLLARS (\$1,000.00) for each and every day that the default continues. Said additional penalties are due and payable to the Department as they accrue.
- f. If the Respondents fail to comply with Part XVII, item 5 above in a timely manner, the Respondents shall pay a CIVIL PENALTY in the amount of SEVENTEEN THOUSAND FIVE HUNDRED DOLLARS (\$17,500.00), payable within 30 days of default. Further, in the event of default, the Respondent is assessed an additional penalty of ONE THOUSAND DOLLARS (\$1,000.00) for each and every day that the default continues. Said additional penalties are due and payable to the Department as they accrue.

7. The Respondents shall otherwise conduct business in accordance with the Act and rules promulgated pursuant to the Act.
8. The Director of the Division may, for good cause shown, extend the compliance dates contained within this ORDER. In order to be eligible for this time extension, the Respondents shall submit a written request to be received in advance of the compliance date. The written request must include sufficient detail to justify such an extension and include at a minimum the anticipated length of the delay, the precise cause or causes of the delay, and all preventive measures taken to minimize the delay. Any such extension by the division will be in writing. Should the Respondents fail to meet the requirement by the extended date, any associated Civil Penalty shall become due 30 days thereafter.
9. Further, the Respondents are advised that the foregoing ORDER is in no way to be construed as a waiver, expressed or implied, of any provision of the law or regulations. However, compliance with the ORDER will be one factor considered in any decision whether to take enforcement action against the Respondents in the future.

Issued by the Commissioner of the Tennessee Department of Environment and Conservation on this 18th day of June, 2008.


James H. Fyke, Commissioner
Tennessee Department of Environment and
Conservation

NOTICE OF RIGHTS

Tenn. Code Ann. §§ 69-3-109 and §§ 69-3-115, allow any Respondent named herein to secure review of this Order and Assessment. In order to secure review of this Order and Assessment, the Respondent must file with the Department's Office of General Counsel a written petition setting forth each of the Respondent's contentions and requesting a hearing before the Water Quality Control Board. The Respondent must file the written petition within thirty (30) days of receiving this Order and Assessment. The petition should be sent to: "Appeal of Enforcement Order, TDEC-OGC, 20th Floor L & C Tower, 401 Church Street, Nashville, TN 37243-1548".

If the required written petition is not filed within thirty (30) days of receipt of this ORDER AND ASSESSMENT, the ORDER AND ASSESSMENT shall become final and will be considered as an agreement to entry of a judgment by consent. Consequently, the ORDER AND ASSESSMENT will not be subject to review pursuant to Tenn. Code Ann. §§ 69-3-109 and 69-3-115.

Artificial Respondents (corporations, limited partnerships, limited liability companies, etc.) cannot carry-on the practice of law. They may secure review (appeal) before the Water Quality Control Board only through an attorney licensed to practice law in Tennessee. Natural Respondents may represent themselves or be represented by an attorney licensed to practice law in Tennessee. Low-income individuals may be eligible for representation at no cost or reduced cost through a local bar association or legal aid organization.

If the Respondent is an individual, the Respondent may either obtain legal counsel representation in this matter, both in filing its written petition and in presenting evidence at the hearing, or proceed without an attorney. Low-income individuals may be eligible for representation at no cost or reduced cost through a local bar association or legal aid organization.

Any hearing of this case before the Water Quality Control Board for which a Respondent properly petitions is a contested case hearing governed by Tenn. Code Ann. § 4-5-301 *et seq.* ("the Uniform Administrative Procedures Act") and the Department of State's Uniform Rules of Procedure for Hearing Contested Cases Before State Administrative Agencies. The hearing is in the nature of a trial before the Board sitting with an Administrative Law Judge. The Respondent may subpoena witnesses on its behalf to testify.

Payment of the civil penalty shall be made to "Treasurer, State of Tennessee" and shall be sent to the Division of Fiscal Services, Consolidated Fees Section, Tennessee Department of Environment and Conservation, 14th Floor L & C Annex, 401 Church Street, Nashville, TN 37243. The case number, shown on the first page of this Order and Assessment, should be

included on or with the payment. All other correspondence shall be sent to Paul E. Davis, Director, Division of Water Pollution Control, Tennessee Department of Environment and Conservation, 6th Floor L & C Annex, 401 Church Street, Nashville, TN 37243.



Max A. Fleischer

Assistant General Counsel

Tennessee Department of Environment and
Conservation

401 Church Street, L & C Tower, 20th Floor
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